United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-6089

To be argued by Terence M. Brown

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

JAMES P. LEE, JR.,
Plaintiff-Appellant

v.

WILLIAM L. THORNTON, DISTRICT DIRECTOR,
UNITED STATES CUSTOMS FOR VERMONT, ET AL.
Defendant-Appellee

RONALD RICH,
Plaintiff-Appellant

v.

WILLIAM L. THORNTON, DISTRICT DIRECTOR,
UNITED STATES CUSTOMS FOR VERMONT, ET AL.
Defendant-Appellee

APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF VERMONT

BRIEF FOR THE APPELLEE

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I N D E X

CITATIONS

Statutes and Rules continued: Page

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ISSUES PRESENTED

1. Whether the bond requirement of 19 U.S.C. 1608 is constitutional (Appellant Lee).

2. Whether 19 U.S.C. 1954, which authorizes the seizure of vehicles as security for fines incurred for violations of the customs laws, denies to the owner/drivers of such vehicles due process of law (Appellant Rich).

STATUTES INVOLVED

The relevant statutes and pertinent provisions of the Code of Federal Regulations are included in an addendum to this brief (Ad. at 4).

STATEMENT

1. This appeal involves two similar, but factually unrelated cases which were heard in tandem by the United States District Court for the District of Vermont. The claims were originally heard by a three-judge court (Lee v. Thornton, 370 F. Supp. 312 (D. Vt. 1974); Lee App. A 47), whose decision was vacated by the Supreme Court on the ground that the three-judge court had erroneously assumed jurisdiction under the Tucker Act, 28 U.S.C. 1346(a)(2) (Lee et al. v. Thornton, 420 U.S. 139 (1975); Lee App. A. 78). On remand the three-judge court concluded that there were no other appropriate grounds for the exercise of jurisdiction by a three-judge court, and accordingly returned the case to a single United States District Judge (Lee App A81). That court (Coffrin, J.) then considered appellants' claims on the merits, and rejected them (Lee App. A83).

2. At the hearing before the three-judge court, no

testimony was adduced at appellants' request (T. 6-7).[1] Thus, the record here consists primarily of "stipulations"[2] as to how the parties would have testified had they been called, affidavits, and various other documents generated by the seizures. The facts are set forth in both the opinion of the three-judge court (370 F. Supp. 312; Lee App. at 47), and the single district court (Lee App. at 81). The following statement comes principally from the stipulations (Lee App. A.22; Rich App. A. 14) and the opinions of the two lower courts.

3. Appellant Rich

On October 27, 1971, appellant Rich, a local resident, and his family entered the United States from Canada via Wolfridge road in Alburg, Vermont. Rather than following directions posted on road signs which directed travelers to the port of entry (Rich App., Ex. C), appellant proceeded towart St. Albans. Observed by a Border Patrol Agent, appellant was stopped near

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1/ At the argument before the three-judge court, the government attorney announced that the "seizing agent. . . is flying up from Washington and . . . may be here [by] midmorning [and he] . . . would be available for testimony if the court wishes " (T. 6). However, counsel for appellant rejected this suggestion, stating (T. 7): "As to the testimony of Special Agent O'Hara, we are somewhat of at a disadvantage as we had not known he was to testify. I would prefer to ask the Court that his testimony come in by way of affidavit and that we be permitted to consult our clients who is not here today and submit a counter affidavit, after we have seen his, if we may."

2/ The "stipulations" do not resolve conflicts between the appellants' versions of events, and the government's.

Swanton, Vermont (370 F. Supp. at 316), by the agent, who accused appellant of illegally entering the United States. The agent then ordered appellant to go back to the port of entry at Highgate Springs.

At the Highgate station, appellant's car was searched and held (pursuant to 19 U.S.C. 1594), and he was advised of the nature of the charge (failure to immediately report pursuant to 19 U.S.C. 1459), and the penalty which could be assessed ($1600 under 19 U.S.C. 1460).[3/] He was also informed that he could file a petition for remission and mitigation, which he did (Rich App. Ex. A). The customs inspector "immediately acted upon the petition to the extent of determining that if a deposit of $50.00 were made toward the ultimate mitigated penalty" (Rich App. A 15), the car would be released. Rich posted the $50 deposit, reclaimed his car, and left.

On January 6, 1972, appellant received a "Notice of Penalty . . . Incurred and Demand for Payment" signed by defendant Thornton (Rich App. Ex. B). Appellant made no effort to contact defendants, and on January 14, 1972, defendant Thornton wrote appellant (Rich App. Ex. C). Thornton stated that because

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3/ Appellant Rich was personally liable for a penalty of $100 plus an additional penalty of $500 for each passenger, 19 U.S.C. 1460.

appellant failed to "follow the road signs directing [travelers] to the port of entry. . . [we] have to consider your non-compliance with the reporting requirements as intentional." The letter then went on to state that the penalty was nevertheless mitigated to $25 (to be deducted from the $50 deposit), since appellant had no prior record of customs violations and there was no evidence that he had been attempting to "pass merchandise through customs without paying the lawful duties thereon."

Appellant did not file a supplemental petition for relief. See 19 C.F.R. §171.33. On October 19, 1972, appellant filed the instant complaint in the United States District Court for the District of Vermont (Rich App. at 1).

4. Appellant Lee.

Appellant Lee and three others entered the United States in the early morning hours of October 5, 1971, in appellant's Volkswagon van. One of appellant's companions was driving, while appellant slept. The driver of the van stopped at the Alber Springs border station, which was closed, and read the instructions which directed travelers to proceed to the Highgate immigration station. Instead of complying with these directions, the driver proceeded to his father's home in East Alburg, purportedly to get gasoline.[4/] When they arrived at their destination

4/ According to both the driver and appellant, the van was low on gas and they did not believe it would reach the customs station.

in East Alburg, a border patrol officer who had observed them cross the border and had followed them (370 F. Supp. at 315), stopped the vehicle and asked the occupants for identification.

Shortly thereafter customs agents O'Hara and Gardner arrived.[5/] O'Hara ordered appellant and his companions to proceed to the immigration station at Swanton, Vermont. Appellant claimed that the van was low on gas; but when O'Hara attempted to verify this, appellant further explained that the gasoline gauge did not work (Ad. 2). The van made it to the immigration station without difficulty.

The versions of what transpired at the immigration station differ. According to appellant, he and his companions were taken to a detention room where they were questioned. Meanwhile, the van was searched out of their presence, and officials informed him that a quantity of marijuana was found in the vehicle (Lee App. at 24, 38). Appellant "denied the presence of any marijuana or other controlled drug in the van" (Id. at 25).

According to agent O'Hara, the van was searched in the presence of appellant Lee and the driver, and a small quantity of marijuana, as well as foreign merchandise for which there was no proof of purchase, was discovered in Lee's suitcase. Specifically, the agent claimed (Ad. 2-3):

5/ We are including in the addendum (Ad. at 1-3) to our brief the affidavit of agent O'Hara, which is incorported by reference in the Lee stipulation (Lee App. A 27, ¶C), but which was not included in his appendix.

> I drove the van into the well lighted garage of the Border Patrol, and in the presence of Lee and Mumley [driver], Agent Gardner and I proceeded to search the vehicle. Almost immediately, we discovered a few seeds, which appeared to be marihuana, on the floor of the Volkswagen van. * * * *
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> As each piece of luggage was identified by its owner it was then searched. During the course of the search of a bag belonging to Lee, I discovered a Yashica camera and a plastic bag ("Baggie" type) containing a quantity, later determined to be one and one-half (1-1/2) grams of marihuana seeds. (This package was approximately the size of a golf ball and was buried beneath other contents in the bag.) I displayed this package to Lee and he asked, "what is it?" I told him it was marihuana seeds. He then said it wasn't his. Upon continuing my search of this bag, I discovered two "alligator clip scales," which are devices commonly used to measure quantities of marihuana or drugs for purchase and sale. I displayed these scales to Lee and he denied ownership, but did not volunteer whose property they were.

Lee was then informed that he and the others were free to go, but that the van, marijuana, and foreign merchandise would be held.

Later that day (October 5, 1971), appellant contacted defendant Thornton, who stated that the property would be released if appellant posted a deposit of $1800.00. Appellant was also informed that he could submit a petition for remission and mitigation.

By letter dated October 19, 1971 (Lee App. at 34, Ex. A), defendant Thornton formally advised appellant that his property had been seized because of violations of 19 U.S.C. 1459, 1595a and 21 U.S.C. 881. Moreover, because of these violations, appellants' property was subject to forfeiture and he was also liable

for a penalty of $1,845. The letter also set forth appellant's right to petition for mitigation and remission and the time limits for doing so.

On October 27, 1971, Lee filed a petition for remission and mitigation (Lee App. A 35, Ex B), in which he claimed that he had purchased the seized personal property in the United States, rather than abroad. He also denied the presence of marijuana in the van. By letter dated November 1, 1971, defendant Thornton granted relief (Lee App.at 40, Ex. C).Thornton stated that although the van had proceeded in a direction leading away from the alternate reporting spot, there was no evidence that by thus "not proceeding directly to a reporting place you were attempting to introduce merchandise into the country without paying lawful duties thereon and since there is no record here of a prior violation by you of any customs laws", he concluded that relief was warranted. He therefore remitted the personal penalty. He also mitigated the forfeiture of the Volkswagon van to $100 since "the vehicle was found being used to transport marihuana."

Lee did not post the $250 bond necessary to initiate a judicial forfeiture proceeding, 19 U.S.C. 1608. He claims that he was unable to post a $250 bond, although he did not so apprise defendant Thornton, nor did he seek leave to proceed in

forma pauperis, 28 U.S.C. 1915. Lee paid the $100 mitigated forfeiture and secured his property. He did not file a supplemental petition for relief, 19 C.F.R. §171.33.

On November 23, 1971, Lee filed the instant complaint in the United States, District Court for the District of Vermont (Lee App. A.1).

5. In appellants' complaints, they urged inter alia, that the Fourth (Rich App. A 3-4, ¶15) and Fifth (Lee App. A4, ¶17) Amendments mandate a hearing "prior to or immediately after" the seizures. The three-judge court, relying on Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), and Goldberg v. Kelly, 397 U.S. 254 (1970), agreed that an informal, pre-seizure hearing was necessary (Lee App. A. 58, 51). Following the Supreme Court's decision to vacate the opinion of the three-judge court for want of jurisdiction, the single district court judge reconsidered appellants contentions. It held that the intervening decision in Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974), was dispositive, and that appellants had no right to a pre-seizure hearing. It also held that the statutory scheme did provide a constitutionally sufficient opportunity for a hearing. [Lee App. A. 83 et seq.]

6. Even though the pertinent statutes and regulations are set forth in our Addendum and are discussed throughout the brief, we describe briefly here the statutory and regulatory scheme governing appellants' claims. Section 1459 of Title 19 requires the person in charge of any vehicle entering the United States from a contigious country to "immediately report his arrival to the customs officer at the port of entry or customhouse which shall be nearest to the place" of entry into the United States. A failure to observe this requirement subjects the person in charge of the vehicle to a $100 penalty plus an additional penalty of $500 for each passenger. 19 U.S.C. 1460. Section 1594 of Title 19 provides that whenever a driver or person in charge of a vehicle has become subject to a penalty for violation of the customs revenue laws, the vehicle "shall be held for the payment of such penalty and may be seized and proceeded against summarily by libel to recover the same. . . ."[6/]

6/ 19 C.F.R. 162.42 provides in pertinent part:

> If seizure is made under a statute which provides that the property may be seized and proceeded against by libel, the summary forfeiture procedures set forth in §§162.45, 162.46, and 162.47 do not apply. Such cases shall be referred to the United States Attorney.

The regulation further provides that the district director may request the United States Attorney to seek a decree of forfeiture.

Where contraband has been brought into the United States, the vehicle transporting such contraband is subject to forfeiture. 19 U.S.C. 1595a, 21 U.S.C. 881. Where the appraised value of the vehicle is $2500 or less, the summary forfeiture provisions of 19 U.S.C. 1607 and 1609 are applicable.[7] 21 U.S.C. 881(d). See, also, 19 C.F.R. 162.45, 162.46 and 162.47. Summary forfeiture may be avoided by posting a $250 bond which assures a judicial condemnation proceeding. 19 U.S.C. 1608. See Rule C of the Supplemental Rules for Certain Admiralty and Maritime Claims, which governs the institution of judicial forfeiture proceedings.[8] See 21 U.S.C. 881(b). The claimant of any property proceeded against by the United States in an action for forfeiture bears the burden of proof in such proceeding provided that the United States first establishes

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[7] Summary forfeiture proceeding are not available when the appraised value of the vehicle exceeds $2500. 19 U.S.C. 1610.

[8] Rule C should also presumably apply in a proceeding by libel under 19 U.S.C. 1594, since Rule C which expressly applies to judicial forfeiture actions pursuant 21 U.S.C. 881 applies "[w]enever a statute of the United States provides for a maritime action in rem or a proceeding analogous thereto," and since no statute or regulatory provision specifies the procedure to be followed in instituting a proceeding in libel under §1594. See 28 U.S.C. 2461.

probable cause for the forfeiture. 19 U.S.C. 1615.

An individual subject to a fine or penalty for violation of the customs revenue laws or whose vehicle or property is subject to forfeiture may petition for remission or mitigation of the fine, penalty or forfeiture. The Secretary of the Treasury or his delegate "may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto" if

> he finds that such fine, penalty or forfeiture was incurred without wilfull negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture * * *. [19 U.S.C. 1618]. 9/

If dissatisfied with the disposition of the petition, a supplemental petition for relief may be filed. 19 C.F.R. 171.33. If no additional relief is granted, or if the petitioner is not satisfied with the relief granted, or if a specific request is made, the matter must be forwarded to the regional Commissioner "for reconsideration and disposition of the case" [Id.].

9/ In making this determination the Secretary or his delegate "may issue a commission to any customs officer to take testimony upon such petition . . .". 19 U.S.C. 1618.

ARGUMENT

I

THE BOND REQUIREMENT OF 19 U.S.C. 1608 IS CONSTITUTIONAL

Section 1608 of title 19 provides that one claiming an interest in a seized vehicle worth $2500 or less may compel the government to initiate judicial condemnation proceedings (rather than summary forfeiture proceedings under 19 U.S.C. 1607 and 1609) by filing a claim with the appropriate customs officer[10] and filing a $250 bond. Appellant Lee challenges this bond requirement, contending that it is an unconstitutional barrier which prevented him, as an indigent, from receiving a hearing[11] (Br. 11-19).

The court below rejected appellant's claim, stating:

> Although at first blush the bond requirement may seem unreasonable, we believe that it is a sensible and fair way to defray the cost of conducting a condemnation proceeding where the subject property is itself of modest value. We note that the bond will stand for costs only if the Government succeeds in obtaining condemnation. 19 U.S.C. §1608. Thus if for some reason condemnation does not occur, the

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10/ The appropriate customs officer is the district director. 19 C.F.R. 162.47.

11/ We note that the thrust of appellant Lee's claim initially was that the statutory scheme violated the Fourth Amendment in that there was no provision for a "probable cause [hearing]. . . prior to or immediately after said seizure" (Lee App. A14, ¶16; see also plaintiff's memorandum of law, civil action 6762, dated March 1, 1973, pp. 21 et seq.). However, in light of Calero-Toledo v. Pearson Yacht Leasing Co., supra, 416 U.S. 663, appellant has abandoned his claim for a pre-seizure hearing (Br. p. 12, n.6).

> bond is released. If claimants did not have to file a bond, however, the expense of seeking condemnation might well exceed the value of the prize. Bad faith claims might persuade the Government to discontinue meritorious condemnation actions. Property of greater value covers the expense of condemnation if the action succeeds. Since there is a rational basis for the bond requirement, plaintiffs' challenge must fail. Ortwein v. Schwab, 410 U.S. 656 (1973) (per curiam); United States v. Kras, 409 U.S. 434 (1973). [Lee App. at 97].

Appellant Lee challenges this analysis, urging that the rational basis test imployed in Ortwein and Kras is inapplicable because the filing fees in those cases did not deprive indigents of access to process to which they were constitutionally entitled, whereas the bond requirement here serves to deprive indigents of an opportunity for a hearing which is, he argues, mandated by the Constitution (Br. 11-16). Appellant also questions whether there is in fact a rational basis for the bond requirement (Br. 16-19).

Contrary to appellant's claim however, he was not deprived of an opportunity for a hearing as a consequence of his alleged indigent status. Although the posting of a $250 bond is necessary in order to avoid a summary forfeiture proceeding and to obtain a hearing, appellant Lee made no attempt, as the court below noted (Lee App. A 104, n. 6), to proceed in forma pauperis.[12/]

12/ Nor did appellant bring his alleged indigency to the attention of the customs authorities or United States Attorney prior to the initiation of this action (Lee App. A 35-39; T. 75). Had he done so, it would seem that this might well have been a factor which would have weighed heavily in assessment of the mitigated forfeiture (T.55). Moreover, we note that 19 U.S.C. 1618 authorizes customs collectors to take testimony where necessary. Had appellant requested, an administrative hearing might have been provided.

In pertinent part, 28 U.S.C. 1915 provides that "[a]ny court of the United States may authorize the commencement. . . of any suit, action or proceeding, civil or criminal. . . without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefore" (emphasis added). Since the effect of invoking the provision of 19 U.S.C. 1608 is to compel commencement of a proceeding for forfeiture in the appropriate district court, there is no reason to doubt the applicability of 28 U.S.C. 1915. As this Court intimated in Colacicco v. United States, 143 F.2d 410, 411 (2nd Cir.), cert. den., 323 U.S. 763 (1944), there is no apparent reason why one who is truly indigent could not make application under this statute for permission to proceed without payment of the bond.[13] Accordingly, there is no reason to consider a claim that the bond requirement impaired the ability of one to challenge a forfeiture, where the claimant has not shown that he was unable to obtain leave to proceed in forma pauperis. Yakus v. United States, 321 U.S. 414, 435 (1944).[14]

13/ This is not a situation like that presented in United States v. Kras, 409 U.S. 434, 439 (1973), where the statutes in question (bankruptcy laws) had been specifically amended to abolish in forma pauperis petitions. The customs laws, and specifically 19 U.S.C. 1608, contain neither an express nor implied limitation upon the applicability of 28 U.S.C. 1915.

14/ The Court stated in Yakus [at 435]:

> Only if we could say in advance of resort to the statutory procedure that it is incapable of affording due process to petitioners could we conclude that they have shown any legal excuse for their failure to resort to it or that their constitutional rights have been or will be infringed.

No such showing was made here.[15] Having not sought to invoke the apparently applicable procedures of 28 U.S.C. 1915, appellant is in no position to claim that his alleged status as an indigent precluded recourse to procedures he believes were constitutionally required.

II

SECTION 1594 OF TITLE 19, WHICH AUTHORIZES THE SEIZURE OF VEHICLES AS SECURITY FOR FINES INCURRED FOR VIOLATIONS OF THE CUSTOMS LAWS, DOES NOT DENY OWNER/DRIVERS OF SUCH VEHICLES DUE PROCESS OF LAW

Section 1460 of Title 19 specifies the penalties applicable to one who violates 19 U.S.C. 1459, and §1594 provides that

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15/ Appellant's reliance on Fell v. Armour, 355 F. Supp. 1319 (M.D. Tenn. 1972), is misplaced. The Tennessee statute involved there had no provision for notice to the owner of the vehicle that it had been seized, the reason for the seizure, or how the seizure might be contested. In order to challenge the seizure, one who claimed an interest in the vehicle had to post a $250 bond, and there was apparently no state in forma pauperis statute applicable (although the plaintiff there was allowed to proceed in forma pauperis as a matter of grace). Id. at p. 1332. In the instant case, by contrast, all interested parties must be notified of the fine or forfeiture incurred, as well as their "right to apply for relief under" 19 U.S.C. 1618. 19 C.F.R. 162.31. Moreover, the bond requirement of 19 U.S.C. 1608 can, as we have noted, be avoided if the interested party is truly indigent. 28 U.S.C. 1915.

where the owner or driver of a vehicle "has become subject to a penalty for violation of the customs-revenue laws of the United States, such...vehicle shall be held for the payment of such penalty and may be seized and proceeded against summarily by libel to recover the same . . ."

Thus, when appellant Rich was stopped by border patrol agents for having failed to "immediately report his arrival to the customs officer at the port of entry or customhouse...nearest to the place" of entry, he was ordered to go back to the port of entry at Highgate Springs, where he was advised of his violation of the customs laws, the fine for which he was liable, and that his car would be held as security. He was also advised that he could immediately file a petition for remission and mitigation pursuant to 19 U.S.C. 1618, which he did. The customs inspector immediately acted upon the petition, accepting a $50 deposit as security for the ultimate fine, in lieu of the car (Lee App. A 15-16, Ex. A).

Appellant was formally notified of the fine on January 5, 1972 (Rich App. Ex. B), and of the remission which was granted (ultimate fine of $25) on January 14, 1972.

Appellant Rich challenges on due process grounds the procedures whereby his vehicle was temporarily held and the mitigated penalty assessed. He first claims that he was entitled to a hearing prior to the seizure of his vehicle. He also contends that he was afforded no opportunity for a hearing to contest the

final assessment of his penalty for violation of 19 U.S.C. 1459.

A. The Undisputed Facts Do Not Establish Any Need For A Hearing To Determine Whether Appellant Pich Violated 19 U.S.C. 1459.

The reporting requirement of §1459 is phrased in absolute terms; it includes no requirement that the violation be willful or intentional. It is a strict liability statute, enforced with civil sanctions, for which there is no intent requirement. See One Lot Emerald Cut Stones v. United States, 409 U.S. 232, 234-237 (1972). Intent is a relevant factor only to the extent that the statutory scheme confers administrative discretion to remit or mitigate penalties and forfeitures where the violation is unintentional, without wilful negligence, or where circumstances otherwise justify granting relief. 19 U.S.C. 1618.[16/] Thus, appellant Rich's

16/ It is clear that the powers of remission and mitigation rest with the executive. As the court stated in United States v. One 1961 Cadillac, 337 F.2d 730, 733 (6th Cir. 1964):

> The purpose of the remission statutes was to grant executive power to relieve against the harshness of forfeitures. The exercise of the power, however, was committed to the discretion of the executive so that he could temper justice with mercy or leniency. Remitting the forfeiture, however, constituted an act of grace. The courts have not been granted jurisdiction to control the action of the executive, even where it is alleged, as here, in general conclusory language, that discretion has been abused.

claim that he failed to "immediately report" his entry at "the port of entry or customhouse which shall be nearest" to the point of entry [19 U.S.C. 1459] because he "got mixed up on [the] roads" [Rich App., Ex. A], did not relieve him of liability under 18 U.S.C. 1460, but was merely a factor to be considered administratively for purposes of remission and mitigation. His claim was so considered, and a minimal fine resulted.

There is no merit to appellant's contention that he has a "colorable claim" of having not violated 19 U.S.C. 1459 (Br. at 31, n.21). Appellant concededly entered the United States via Wolfridge Road (Alburg, Vermont) [Rich App. at 14] and concededly was stopped by border patrol agents in the vicinity of Swanton, Vermont [Rich App. at 15]. This Court may take judicial notice of the geography of the area, F.R.E. 201(b), as well as of the fact that Alburg is a port of entry (19 C.F.R. §1.2), and Alburg Springs is a customshouse (19 C.F.R. §1.3). An examination of any reasonably detailed road map of the area clearly reveals that one who enters the United States through Alburg and proceeds to Swanton without going through customs, has clearly failed to "immediately report" his entry at "the port of entry or customshouse which shall be nearest" to the point of entry, as required. 17/

17/ We have included in the Addendum to this brief a map (Ad. at 13) [United States Department of the Interior Geological Survey Map: East Alburg quadrangle, Vermont, NW/4 St. Albans 15' Quadrangle, N 4452.5-W7307.5/7.5 (1964); Rouses Point Quadrangle, Vermont--New York, NE/4 Rouses Point 15' Quadrangle, N 4452 5-W 7315/7.5

Having thus stipulated to facts which established liability for a fine considerably in excess of that imposed, appellant Rich is not entitled to a hearing where no material issues of fact are in dispute.[18] See, Swift v. Ciccone, 472 F.2d 577, 578 (8th Cir. 1972).[19] In these circumstances, there is no reason

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(1966)] which shows all pertinent geographical points. Wolfridge Road runs from coordinate 638, in the extreme northwestern portion of the East Alburg Quadrangle, to Greenwood Cemetery. The map also indicates the locations for United States Customs nearest this point of entry.

18/ Appellant Lee also stipulated to facts which established liability for penalties under 19 U.S.C. 1459 and 1460. However, the penalty for this violation was remitted in full, and appellant accordingly raises no claim in this regard.

19/ We note, moreover, that appellant Rich failed to exhaust his administrative remedies. He could have filed a supplemental petition for remission and mitigation, if dissatisfied with the district director's disposition of his initial petition. If the district director concludes that no additional relief is warranted, or if the petitioner is dissatisfied with the additional relief granted, the matter must be referred to the regional commissioner "for reconsideration and disposition of the case." 19 C.F.R. 171.33. In addition, 19 U.S.C. 1618 provides that the Secretary of the Treasury (or his delegate) may issue a commission to any customs officer to take testimony upon the filing of a petition for remission or mitigation.

to entertain appellant's claim that he was denied due process of law as a consequence of the failure to afford him a hearing to contest his liability under §§'s 1459 and 1460. He has pointed to no facts which would relieve him from liability under 19 U.S.C. 1459 and 1460; indeed, he has stipulated to facts which establish such liability. Having therefore failed to demonstrate any need for a hearing, he should not be heard to complain that his rights under the Due Process Clause of the Fifth Amendment were violated because he did not receive a hearing.

B. Due Process Does Nor Require A Pre-Seizure Hearing Where A Vehicle Is Seized (Pursuant To 19 U.S.C. 1594) As Security For Fines Incurred By The Driver Of That Vehicle For Violations Of The Customs Laws.

While we believe appellant Rich is in no position to claim a violation of due process in view of his stipulation to facts which establish a violation of 19 U.S.C. 1459 and thereby obviate any need for a hearing, his claim that he was entitled to a "pre-seizure hearing" is fully answered by the Supreme Court's opinion in Calero-Toledo v. Pearson Yacht Leasing Co., supra, 416 U.S. 663, which set forth principles that the court below properly regarded as controlling here (Lee App. at 94).

In Calero-Toledo, at 416 U.S. at 676-680, the Supreme Court held that the absence of preseizure notice and hearing in a Puerto Rican statute authorizing the seizure for purposes of forfeiture of a vessel used for unlawful purposes, did nct

deny due process of law to the vessel's owner (who was not involved in the illegal activity). In reaching this conclusion, the Court observed [Id. at 678-679]:

> [I]n limited circumstances, immediate seizure of a property interest, without an opportunity for prior hearing, is constitutionally permissible. Such circumstances are those in which
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> > "the seizure has been directly necessary to secure an important governmental or general public interest. Second, there has been a special need for very prompt action. Third, the State has kept strict control over its monopoly of legitimate force: the person initiating the seizure has been a government official responsible for determining, under the standards of a narrowly drawn statute, that it was necessary and justified in the particular instance." [Fuentes v. Shevin, 407 U.S. 67] at 91.
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> Thus, for example, due process is not denied when postponement of notice and hearing is necessary to protect the public from contaminated food, North American Storage Co. v. Chicago, 211 U.S. 306 (1908); from a bank failure, Coffin Bros. & Co. v. Bennett, 277 U.S. 29 (1928); from misbranded drugs, Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950); to aid the collection of taxes, Phillips v. Commissioner, 283 U.S. 589 (1931); or to aid the war effort, United States v. Pfitsch, 256 U.S. 547 (1921).

In applying these principles, the Court concluded that the Puerto Rican statute authorizing seizure without prior notice or hearing served significant governmental purposes by permitting Puerto Rico "to assert in rem jurisdiction over the property in order to conduct forfeiture proceedings, thereby fostering the public interest in preventing continued illicit use of the property and in enforcing criminal sanctions" (Id.

at 679; citation omitted). The Court also concluded that "preseizure notice and hearing might frustrate the interests served by the statutes, since the property seized . . . will often be of a sort that could be removed to another jurisdiction, destroyed, or concealed, if advance warning of confiscation were given" (Id.). Finally, the Court regarded as critical the fact that the seizure was initiated, not by "self-interested private parties, but by commonwealth officials who determine whether seizure is appropriate under statutory guidelines (Id.). These circumstances, the Court concluded, presented "an 'extraordinary' situation in which postponement of notice and hearing until after seizure did not deny due process" [416 U.S. at 679-680]. These compelling circumstances are likewise present here.

The reporting requirements of 19 U.S.C. 1459 serve a paramount governmental purpose in enabling customs and immigration officials to control, and thereby effectuate Congressional policies regarding the influx of goods, merchandise and individuals into the United States. While forfeiture of a vehicle used in entering the United States is not a consequence of violating §1459, Congress has determined that immediate seizure of the vehicle as security for payment of any penalty incurred serves the salutary puspose of assuring that liability for such penalties is not easily avoided and that observance

of the reporting requirements is thereby facilitated.

Thus, the statutory scheme furthers compliance with the reporting requirements of the customs laws by insuring that those who refuse to comply will pay the appropriate penalty. Those who enter will frequently be aliens - who could subsequently return to their own countries and safely ignore penalties - or citizens who live a great distance away and who might well perceive that the collection of such fines by the United States would entail so much expense and difficulty that they might safely be ignored. Preseizure notice and hearing would frustrate the interest served by the seizure-for-security statute. As noted, the underlying rationale of the statute is to insure that those who have incurred a penalty do not defeat it by ignoring the penalty and forcing the government to go to the disproportionate expense of attempting to locate them and collect the fine. If a preseizure hearing were required, the person could frequently just drive away, putting the government in precisely the situation which Congress attempted to prevent by the security statute. Thus, the seizure is "directly necessary to secure an important governmental or general public interest" and there is"a special need for very prompt action" [416 U.S. at 678-679].

Finally, it is manifest in the realm of customs regulation that "the State has kept strict control over its monopoly of

legitimate force" [416 U.S. at 678] and that government officials, not self-interested parties, are responsible for determining whether seizure is appropriate.[20] Where disinterested government officials apprehend a citizen in the act of failing to report his entry, the potential for mistaken seizures is minimal. So long as there is no evidence of contraband or illegal aliens, the impact on the traveler will generally be negligible, since he can, as was the case here, seek administrative relief immediately.

20/ Thus, the situation here is unlike that presented in Fuentes v. Shevin, 407 U.S. 67 (1972), where a party with a personal interest in the outcome initiated the seizure. Indeed, seizure without prior notice or hearing may in certain circumstances be consistent with the requirements of due process, even though the party initiating the seizure has a personal interest in the outcome. Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974).

In Mitchell, the Supreme Court upheld a Louisiana sequestration procedure whereby a creditor with a security interest in assets could seize them without the debtor's having received a prior hearing, if the creditor established, by affidavit, a prima facie showing that the debtor was in arrears. The Court stated that "[t]he requirements of due process of law 'are not technical, nor is any particular form of procedure necessary.'" (citation omitted). Rather, the question is whether the statutory scheme "has reached a constitutional accomodation of the respective interests" of the party seeking to seize the plaintiff's property and the plaintiff [416 U.S. at 610]. Moreover, "[t]he usual rule has been 'where only property rights are involved, mere postponement of the judicial enquiry is not a denial of due process, if the opportunity given for ultimate judicial determination of liability is adequate.'" [Id. at 611; citation omitted]. The Court then weighed a number of factors, such as the potential impact on the debtor, and "the risk of wrongful interim possession by the creditor"[Id. at 618],and concluded the statutory scheme was valid. Appellant's attempt to distinguish Mitchell (Br. pp. 23-24) on the ground that the creditor (Footnote cont'd.)

The statutory scheme evidences a reasonable and constitutional accommodation of the interests of the government and those individuals who cross its boundaries. The reporting requirement of §1459 is essential to effective enforcement of the customs laws and 19 U.S.C. 1594, which permits customs officials to hold vehicles used in violation of this requirement as security for payment of penalties incurred, gives critical force and effect to the provisions of §1459. Accordingly, the court below properly concluded that these circumstances present "an 'extraordinary' situation in which postponement of notice and hearing until after seizure [does] not deny due process." Calero-Toledo v. Pearson Yacht Leasing Co., supra, 416 U.S. at 679-680.

C. The Statutory Scheme Affords An Opportunity For A Hearing To Determine Whether A Penalty Was Properly Imposed Under 19 U.S.C. 1460 For A Violation Of The Reporting Requirement Of 19 U.S.C. 1459.

Appellant Rich has not been denied the opportunity for a hearing to determine whether the penalty was properly imposed against him under 19 U.S.C. 1460. Appellant elected instead to petition for remission and mitigation pursuant to 19 U.S.C.

20/ Footnote cont'd.
there had a property interest-while the government here did not - is not persuasive. In both instances the seizing party claimed a security interest. In Mitchell, the creditor based his claim on a contractual agreement; here the government claims a security interest based on a Congressional exercise of the police power.

1618 and to make a minimal deposit towards the ultimate mitigated penalty in order to secure release of the vehicle, as a result of which all but $25 of the penalty was remitted. Appellant could have compelled the government to institute a proceeding in libel pursuant to 19 U.S.C. 1594, at which the government would have been required to establish the basis for the penalty. 19 U.S.C. 1615.[21] Section 1594 of Title 19 provides that whenever the owner or person in charge of a vehicle has become subject to a penalty for violation of the customs revenue laws, the vehicle shall be held for payment of such penalty. If the penalty is not paid, the vehicle may be seized and "proceeded against summarily by libel to recover" the penalty.

In appellant Rich's case, the vehicle was not held for payment of the penalty because he made a $50 deposit "toward the ultimate mitigated penalty" (Rich App. at 15) at the time that he filed a petition for remission and mitigation. Subsequently, appellant received from the district director, appellee

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21/ In our view it is reasonable to conclude that the provisions of 19 U.S.C. 1615 - which establish that the burden of proof in forfeiture proceedings rests with the defendant provided the United States first establishes probable cause for institution of the action - apply as will in a libel proceeding under 19 U.S.C. 1594. No statute or regulation otherwise establishes the burden of proof, and the procedures followed in either case - that is, an in rem libel proceeding against a vehicle siezed as security for payment of a penalty as well as an in rem forfeiture proceeding - are fundamentally the same.

Thornton, a notice of the penalty incurred and a demand for payment of the penalties incurred in the amount of $1600 for violation of 19 U.S.C. 1459 (Rich App., Ex. B). Appellant Rich did not respond to the notice. Subsequently, district director Thornton acted on appellant's petition for remission or mitigation, remitted the penalty to $25, and notified appellant Rich of this action.

Had appellant not filed a petition for remission and mitigation and had he not paid a $50 deposit towards the ultimate mitigated penalty, his refusal to pay the penalty initially assessed ($1600) upon demand would have compelled the government to institute a proceeding in libel against the vehicle for recovery of the assessed penalty. 19 U.S.C. 1594.[22] Under such circumstances, the case must be "referred immediately to the United States Attorrey" for appropriate action unless other action is expressly authorized by the Commissioner of Customs." 19 C.F.R. 162.32.[23]

22/ If the United States Attorney determined that institution of a proceeding in libel was appropriate, he would then file an action in the district court. As in judicial forfeiture proceedings, the Supplemental Rules for certain Admiralty and Maritime Claims would govern initiation of the action. See 28 U.S.C. 2461.

23/ The statutes and regulations do not expressly state what "other action" the Commissioner might authorize. However, since recovery of the penalty in an in rem libel proceeding against the vehicle held as security is required by 19 U.S.C. 1594, it is doubtful that any action of the Commissioner could circumvent the requirement. Thus, the regulation apparently reserves to the Commissioner discretion to determine that a particular case does not warrant the time and expense of instituting a proceeding in libel.

Having decided to follow the simpler, less expensive and considerably more convenient procedure of seeking administrative remission and mitigation of penalties, appellant cannot now properly complain because there was no formal hearing before a small portion of the penalty was not remitted. This is particularly so in view of appellant's failure to exhaust his administration remedies. 19 C.F.R. 171.33.[24/]

It is clear that the federal statutory scheme favors administrative resolution of claims of this nature. It is equally clear that Congress need not have provided procedures to ameliorate the consequences of the statute - i.e., seizure of a vehicle as security for payment of penalties until liability is determined in a judicial proceeding. While the impetus to proceed administratively will in many instances be great, the availability of these less cumbersome and less severe procedures does not implicate the statutory scheme which does afford a hearing where a proper claimant compels the government to institute a proceeding in libel.

24/ This case does not present the question whether one dissatisfied with the action taken on a petition for remission or mitigation, after having exhausted available administrative remedies, may withdraw the petition and thereby compel the government to institute a libel proceeding. Appellant Rich at no time sought to withdraw his petition nor did he otherwise communicate to the district director any dissatisfaction with the disposition of his petition. It is unlikely that such a procedure, if available, would be perceived as in the best interests of the party in most instances, since the government could then seize and hold the vehicle pending outcome of the judicial proceeding. 19 U.S.C. 1594.

The statutory scheme vindicates the fundamental governmental purposes reflected in the reporting requirement of 19 U.S.C. 1459 by assuring either that a violation is promptly dealt with, by administrative action, or that the consequence of an apparent violation - seizure of the vehicle pending in judicial determination of liability - is sufficient to encourage compliance. A party may forego administrative remedies and thereby compel a hearing on the question of liability under §§1459 and 1460. The latter procedure is more cumbersome frequently more costly and considerably less convenient; as a consequence, it is less likely to be invoked where liability for a violation of §1459 is clear. However, the critical question for purposes of determining whether the statutory scheme meets the requirements of due process is whether it affords an opportunity for a hearing. That the statute in question does afford an opportunity for a hearing is, we submit, dispositive of appellant's objections on due process grounds. 25/

25/ The three-judge court concluded (Lee App. at 60) that appellant Rich could have utilized 19 U.S.C. 1608 to initiate forfeiture proceedings.

Appellant disputes this (Br. at 30), and there is merit to his contention. The provisions of §1608, particularly when read in conjunction with the applicable regulations (19 C.F.R. 162.45, 162.46, and 162.47), appear to be intended solely for the purpose of avoiding summary forfeiture. However, summary forfeiture procedures have no application to seizures effected pursuant 19 U.S.C. 1594. 19 C.F.R. 162.42. Hence, the applicability of 19 U.S.C. 1608 to proceedings effected pursuant to §1594 is doubtful. Thus, unlike appellant Lee (whose vehicle was used to transport contraband), appellant Rich was not required to post $250 bond in
(Footnote cont'd.)

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the district court should be affirmed.

GEORGE W. F. COOK,
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District of Vermont.

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25/Footnote cont'd.
order to obtain a judicial hearing. [Indeed, as we have argued, appellant Lee, if truly indigent, was not required to post bond either.] In the event that appellant Rich had failed to seek administrative relief, judicial libel proceedings would have been instituted as a matter of course.

CERTIFICATE OF SERVICE

I certify that copies of Brief for the Appellee were mailed this 15th day of December, 1975 to counsel for appellants at the following address:

John A. Dooley, III
Vermont Legal Aid, Inc.
150 Cherry Street
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Burlington, Vermont 05401

Terence M. Brown (RAP)
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ADDENDUM

ADDENDUM

The following affidavit is referred to in the Lee Stipulation (Lee App. A. 27, ¶C), but not included in that appendix.

UNITED STATES DISTRICT COURT

DISTRICT OF VERMONT

JAMES LEE,
Plaintiff

v.

WILLIAM L. THORNTON, District Director of Customs; VERNON D. ACREE, Commissioner of Customs; GEORGE P. SCHULTZ, Secretary of Treasury,
Defendants

Civil No. 6451

AFFIDAVIT OF JOHN F. O'HARA
IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT

I, John F. O'Hara, being first duly sworn, state that the following information is true and correct, based upon my personal observation and knowledge.

At approximately 1:30 A.M. on October 5, 1971, I received a telephone call from my supervisor, Special Agent in Charge Mark Gardner, that a vehicle had been apprehended at East Alburg, Vermont, for failure to report arrival within the United States. Shortly thereafter, I proceeded from my home in Swanton, Vermont, with Agent Gardner, to East Alburg where we were met by Border Patrol Officer Peck and four individuals who were later identified to include James Phillip Lee, Jr. and John Mumley. After Agent Gardner and I had identified ourselves as Customs officers, warned the occupants of the vehicle (a Volkswagen van) of their rights and patted them for concealed weapons, I told

Lee and Mumley that we would take the Volkswagen van, in which they had been riding, to the Border Patrol station at Swanton, Vermont, to be searched for contraband. At this point, Lee said the Volkswagen was low on gas. I checked the gas gauge but Lee then told me that the gauge did not work. We thereupon proceeded to Swanton; I was driving the Volkswagen and Mumley was riding with me. I drove the van into the well lighted garage of the Border Patrol, and in the presence of Lee and Mumley, Agent Gardner and I proceeded to search the vehicle. Almost immediately, we discovered a few seeds, which appeared to be marihuana, on the floor of the Volkswagen van. (Both Agent Gardner and I had made many previously confirmed seizures of marihuana seeds and both of us were convinced from the appearance of these seeds that they were marihuana.)

As each piece of luggage was identified by its owner it was then searched. During the course of the search of a bag belonging to Lee, I discovered a Yashica camera and a plastic bag ("Baggie" type) containing a quantity, later determined to be one and one-half ($1\frac{1}{2}$) grams, of marihuana seeds. (This package was approximately the size of a golf ball and was buried beneath other contents in the bag.) I displayed this package to Lee and he asked, "What is it?" I told him it was marihuana seeds. He then said it wasn't his. Upon continuing my search of this bag, I discovered two "alligator clip scales," which are devices commonly used to measure quantities of marihuana or drugs for

purchase and sale. I displayed these scales to Lee and he denied ownership, but did not volunteer whose property they were. Upon completion of the search, and in Lee's presence, I conducted a K-N reagent field test on a few of the seeds taken from Lee's bag. I told Lee at the commencement of the test: "If this turns orange-red, you've had it." (The reagent did in fact turn orange-red in color.)

Upon ascertaining that neither federal nor state criminal prosecution was authorized in this case, Agent Gardner and I drove Lee and Mumley back to East Alburg, Vermont.

John F. O'Hara
JOHN F. O'HARA

DISTRICT OF VERMONT)
RUTLAND COUNTY)

Subscribed and sworn to before me this 7th day of March, 1973.

Mary A. O'Rourke
Notary Public. My commission expires 2/10/75

The following statutes and provisions of the Code of Federal Regulations, provide in pertinent part:

19 U.S.C. 1459 Contiguous countries; report and manifest

> . . . the person in charge of any vehicle arriving in the United States from contiguous country, shall immediately report his arrival to the customs officer at the port of entry or customhouse which shall be nearest to the place at which such vessel or vehicle shall cross the boundary line. . .

19 U.S.C. 1460 Same; penalties for failure to report or file manifest

> The master of any vessel or the person in charge of any vehicle who fails to report arrival in the United States as required by section 1459 of this title, or if so reporting proceeds further inland without a permit from the proper customs officer, shall be subject to a penalty of $100 for each offense. If any merchandise is imported or brought into the United States in any vessel or vehicle, or by any person otherwise than in a vessel or vehicle, from a contiguous country, which vessel, vehicle, or merchandise is not so reported to the proper customs officers; or if the master of such vessel or the person in charge of such vehicle fails to file a manifest for the merchandise carried therein, or discharges or lands such merchandise without a permit; such merchandise and the vessel or vehicle, if any, in which it was imported or brought into the United States shall be subject to forfeiture; and the master of such vessel or the person in charge of such vehicle, or the person importing or bringing in merchandise otherwise than in a vessel or vehicle, shall, in addition to any other penalty, be liable to a penalty equal to the value of the merchandise which was not reported, or not included in the manifest, or which was discharged or landed without a permit. If any vessel or vehicle not so reported carries any passenger; or if any passenger is discharged or landed from any such vessel or vehicle before it is so reported, or after such report but without a permit; the master of the vessel or the person in charge of the vehicle shall, in addition to any other penalty, be liable to a penalty of $500 for each passenger so carried, discharged, or landed.

19 U.S.C. 1594 Libel of vessels and vehicles

> Whenever a vessel or vehicle, or the owner or master, conductor, driver, or other person in charge thereof, has become subject to a penalty for violation of the customs-revenue laws of the United States, such vessel or vehicle shall be held for the payment of such penalty and may be seized and proceeded against summarily by libel to recover the same . . .

19 U.S.C. 1603. Same; customs officer's reports.

Whenever a seizure of merchandise for violation of the customs laws is made, or a violation of the customs laws is discovered, and legal proceedings by the United States attorney in connection with such seizure or discovery are required, it shall be the duty of the appropriate customs officer to report such seizure or violation to the United States attorney for the district in which such violation has occurred, or in which such seizure was made, and to include in such report a statement of all the facts and circumstances of the case within his knowledge, with the names of the witnesses and a citation to the statute or statutes believed to have been violated, and on which reliance may be had for forfeiture or conviction.

19 U.S.C. 1604. Same; prosecution.

It shall be the duty of every United States Attorney immediately to inquire into the facts of cases reported to him by customs officers and the laws applicable thereto, and if it appears probable that any fine, penalty, or forfeiture has been incurred by reason of such violation, for the recovery of which the institution of proceedings in the United States district court is necessary, forthwith to cause the proper proceedings to be commenced and prosecuted, without delay, for the recovery of such fine, penalty, or forfeiture in such case provided, unless, upon inquiry and examination, such United States attorney decides that such proceedings can not probably be sustained or that the ends of public justice do not require that they should be instituted or prosecuted, in which case he shall report the facts to the Secretary of the Treasury for his direction in the premises.

19 U.S.C. 1606. Same; appraisement

The appropriate customs officer shall determine the domestic value, at the time and place of appraisement, of any vessel, vehicle, merchandise, or baggage seized under the customs laws.

19 U.S.C. 1607. Same; value $2,500 or less

If such value of such vessel, vehicle, merchandise, or baggage does not exceed $2,500, the appropriate customs officer shall cause a notice of the seizure of such articles and the intention to forfeit and sell or otherwise dispose of the same according to law to be published for at least three successive weeks in such manner as the Secretary of the Treasury may direct. For the purposes of this section and sections 1610 and 1612 of this title merchandise the importation of which is prohibited shall be held not to exceed $2,500 in value.

19 U.S.C. 1608. Same; claims; judicial condemnation

Any person claiming such vessel, vehicle, merchandise, or baggage may at any time within twenty days from the date of the first publication of the notice of seizure file with the appropriate customs officer a claim stating his interest therein. Upon the filing of such claim, and the giving of a bond to the United States in the penal sum of $250, with sureties to be approved by such customs officer, conditioned that in case of condemnation of the articles so claimed the obligor shall pay all the costs and expenses of the proceedings to obtain such condemnation, such customs officer shall transmit such claim and bond, with a duplicate list and description of the articles seized, to the United States attorney for the district in which seizure was made, who shall proceed to a condemnation of the merchandise or other property in the manner prescribed by law.

19 U.S.C. 1609. Same; summary of forfeiture and sale.

If no such claim is filed or bond given within the twenty days hereinbefore specified, the appropriate customs officer shall declare the vessel, vehicle, merchandise, or baggage forfeited, and shall sell the same at public auction in the same manner as merchandise abandoned to the United States is sold, or otherwise dispose of the same according to law and shall deposit the proceeds of sale, after deducting the actual expenses of seizure, publication, and sale in the Treasury of the United States.

19 U.S.C. 1614. Release of seized property

If any person claiming an interest in any vessel, vehicle, merchandise, or baggage seized under the provisions of this chapter offers to pay the value of such vessel, vehicle, merchandise, or baggage, as determined under section 1606 of this title, and it appears that such person has in fact a substantial interest therein, the appropriate customs officer may, subject to the approval of the Secretary of the Treasury if under the customs laws, or under the navigation laws, accept such offer and release the vessel, vehicle, merchandise, or baggage seized upon the payment of such value thereof, which shall be distributed in the order provided in section 1613 of this title.

19 U.S.C. 1615. Burden of proof in forfeiture proceedings.

In all suits or actions brought for the forfeiture of any vessel, vehicle, merchandise, or baggage seized under the provisions of any law relating to the collection of duties on imports or tonnage, where the property is claimed by any person, the burden of proof shall lie upon such claimant; and in all suits or actions brought for the recovery of the value of any vessel, vehicle, merchandise, or baggage, because of violation of any such law, the burden of proof shall be upon the defendant; Provided, That probable cause shall be first shown for the institution of such suit or action, to be judged of by the court, subject to the following rules of proof:

(1) The testimony or deposition of the officer of the customs who has boraded or required to come to a stop or seized a vessel or vehicle, or has arrested a person, shall be prima facie evidence of the place where the act in question occurred.

19 U.S.C. 1618. Remission or mitigation of penalties

Whenever any person interested in any vessel, vehicle, merchandise, or baggage seized under the provisions of this chapter, or who has incurred, or is alleged to have incurred, any fine or penalty thereunder, files with the Secretary of the Treasury if under the customs laws or under the navigation laws, before the sale of such vessel, vehicle, merchandise, or baggage a petition for the remission or mitigation of such fine, penalty, or forfeiture, the Secretary of the Treasury, if he finds that such fine, penalty, or forfeiture was incurred without willful negligence or without any intention on the part of the petitioner to defraud the revenue or to violate the law, or finds the existence of such mitigating circumstances as to justify the remission or mitigation of such fine, penalty, or forfeiture, may remit or mitigate the same upon such terms and conditions as he deems reasonable and just, or order discontinuance of any prosecution relating thereto. In order to enable him to ascertain the facts, the Secretary of the Treasury may issue a commission to any customs officer to take testimony upon such petition: Provided, That nothing in this section shall be construed to deprive any person of an award of compensation made before the filing of such petition.

21 U.S.C. 881. Forfeitures - Property subject

(a) The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(1) All controlled substances which have been manufactured, distributed, dispensed, or acquired in violation of this subchapter.

* * * *

(4) All conveyances, including aircraft, vehicles, or vessels, which are used, or are intended for use, to transport, or in any manner fo facilitate the transportation, sale, receipt, possession, or concealment of property described in paragraph (1). . .

(b) Seizure pursuant to Supplemental Rules for Certain Admiralty and Maritime Claims.

Any property subject to forfeiture to the United States under this subchapter may be seized by the Attorney General upon process issued pursuant to the Supplemental Rules for certain Admiralty and Maritime Claims by any district Court of the United States having jurisdiction over the property, except that seizure without such process may be made when-

(1) the seizure is incident to an arrest or a search under a search warrant or an inspection under an administrative inspection warrant;

(2) the property subject to seizure has been the subject of a prior judgment in favor of the United States in a criminal injunction or forfeiture proceeding under this subchapter;

(3) the Attorney General has probable cause to believe that the property is directly or indirectly dangerous to health or safety; or

(4) the Attorney General has probable cause to believe that the property has been used or is intended to be used in violation of this subchapter.

In the event of seizure pursuant to paragraph (3) or (4) of this subsection, proceedings under subsection (d) of this section shall be instituted promptly.

* * * *

(d) Other laws and proceedings applicable.

All provisions of law relating to the seizure, summary and judicial forfeiture, and condemnation of property for violation of the customs laws; the disposition of such property or the proceeds from the sale thereof; the remission or mitigation of such forfeitures; and the compromise of claims and the award of compensation to informers in respect to such forfeitures shall apply to seizures and forfeitures incurred, or alleged to have been incurred, under the provisions of this subchapter, insofar as applicable and not inconsistent with the customs officer or any other person with respect to the seizure and forfeiture of property under the customs laws shall be performed with respect to seizures and forfeituresof property under this subchapter by such officers, agents, or other persons as may be authorized or designated for that purpose by the Attorney General, except to the extent that such duties arise from seizures and forfeitures effected by any customs officer.

28 U.S.C. 1915. Proceedings in forma pauperis

(a) Any court of the United States may authorize the commencement, prosecution or defense of any suit, action or proceeding, civil or criminal, or appeal therein, without prepayment of fees and costs or security therefor, by a person who makes affidavit that he is unable to pay such costs or give security therefor. Such affidavit shall state the nature of the action, defense or appeal and affiant's belief that he is entitled to redress.

19 C.F.R. §162.22 Seizure of conveyances.

(a) General applicability. If it shall appear to any officer authorized to board conveyances and make seizures that there has been a violation of any law of the United States whereby a vessel, vehicle, aircraft, or other conveyance, or any merchandise on board or imported by such vessel, vehicle, aircraft, or other conveyance is liable to forfeiture, the officer shall seize such conveyance and arrest any person engaged in such violation. Common carriers are exempted from seizure except under certain specified conditions as provided for in section 594, Tariff Act of 1930 (19 U.S.C. 1594).

(b) Facilitating importation contrary to law. Every vessel, vehicle, animal, aircraft, or other conveyance which is being or has been used in, or to aid or facilitate, the importation, bringing in, unlading, landing, removal, concealing, harboring, or subsequent transportation of any article which is being, or has been introduced or attempted to be introduced into the United States contrary to law, shall be seized and held subject to forfeiture, and any person who directs, assists financially or otherwise, or is in any way concerned in any such unlawful activity shall be liable to a penalty equal to the value of the article or articles involved.

* * * * *

(d) Retention of vessel or vehicle pending penalty payment. If a penalty is incurred under section 460, Tariff Act of 1930, as amended (19 U.S.C. 1460), by a person in charge of a vessel or vehicle and the vessel or vehicle is not subject to seizure, such vessel or vehicle may be held by the district director under section 594. Tariff Act of 1930, until the penalty incurred by the person in charge has been settled.

* * * * *

19 C.F.R. §162.31 Notice of fine, penalty, or forfeiture incurred.

(a) Notice. Written notice of any fine or penalty incurred as well as any liability to forfeiture shall be given to each party that the facts of record indicate has an interest in the claim or seized property. The notice shall also inform each interested party of his right to apply for relief under section 618, Tariff Act of 1930, as amended (19 U.S.C. 1618), or any other applicable statute authorizing mitigation of penalties or remission of forfeitures, in accordance with Part 171 of this chapter.

* * * * *

19 C.F.R. 162.32 Where petition for relief not filed

(a) Fines and penalties. If the person liable for a fine or penalty for any violation of the Customs or navigation laws fails to petition for relief in accordance with Party171 of this chapter, or pay or arrange to pay the penalty within 60 days from the date of mailing of the notice of violation as provided in section 162.31, the case shall be referred immediately to the U.S. attorney for appropriate action unless other action is expressly authorized by the Commissioner of Customs. However, if it appears that the person liable for the penalty is absent from the United States or during the 60-day period was absent for more than 30 days, the district director may withhold referral for a further reasonable time.

(b) Appraised value of seized property exceeds $2,500. When the appraised value of seized property exceeds $2,500 and neither a petition for relief in accordance with Part 171 of this chapter nor an offer to pay the domestic value as provided for in §162.44 is made within a reasonable time, the district director shall report the facts to the U.S. attorney for the judicial district in which the seizure was made.

19 C.F.R. 162.42 Proceedings by libel.

If seizure is made under a statute which provides that the property may be seized and proceeded against by libel, the summary forfeiture procedures set forth in §§162.45, 162.46, and 162.47 do not apply. Such cases shall be referred to the U.S. attorney. The district director may request the U.S. Attorney to seek a decree of forfeiture providing for delivery of the property to the district director for sale or other appropriate disposition, if such property is not to be retained for official use.

19 C.F.R. 162.45 Summary forfeiture where value not over $2,500: Notice of seizure and sale.

(a) Contents. The notice required by section 607, Tariff Act of 1930, as amended (19 U.S.C. 1607), of seizure and intent to forfeit and sell or otherwise dispose of according to law property not exceeding $2,500 in value shall:

(1) Describe the property seized and in the case of motor vehicles, specify the motor and serial numbers;

(2) State the time, cause, and place of seizure;

(3) State that any person desiring to claim the property must appear at a designated place and file with the district director within 20 days from the date of the first publication of the notice a claim to such property and a bond in the sum of $250, in default of which the property will be disposed of in accordance with the law; and

(4) State the name and place of residence of the person to whom any vessel or merchandise seized for forfeiture under the navigation laws belongs or is consigned, if that information is known to the district director.

(b) Publication. When the appraised value of any property in one seizure from one person other than narcotics and dangerous drugs exceeds $250, the notice shall be published in a newspaper of general circulation in the Customs district and the judicial district in which the property was seized for at least 3 successive weeks. In all other cases, the notice shall be published by posting in a conspicuous place accessible to the public in the customhouse nearest the place of seizure and in the customhouse at the headquarters port for the Customs district, with the date of posting noted thereon, and shall be kept posted for at least 3 successive weeks. . . . .

19 C.F.R. 162.46 Summary forfeiture where value not over $2,500: Disposition of goods.

(a) General. If no petition for relief from the forfeiture is filed in accordance with the provision of Part 171 of this chapter, or if a petition was filed and has been denied, and the property is not retained for official use, it shall be disposed of in accordance with section 609, Tariff Act of 1930, as amended (19 U.S.C. 1609).

19 C.F.R. 162.47 Claim for property subject to summary forfeiture.

(a) Filing of claim. Any person desiring to claim under the provisions of section 608, Tariff Act of 1930 (19 U.S.C. 1608), seized property not exceeding $2,500 in value and subject to summary forfeiture, shall file a claim to such property with the district director within 20 days from the date of the first publication of the notice prescribed in section 162.45.

(b) Bond for costs. The bond in the penal sum of $250 require by section 608, Tariff Act of 1930, to be filed with a claim for seized property shall be on Customs Form 4615. There shall be endorsed on the bond a list or schedule in substantially the following form which shall be signed by the claimant in the presence of the witnesses to the bond, and attested by the witnesses:

* * * *

(c) Claimant not entitled to possession. The filing of a claim and the giving of a bond pursuant to section 608, Tariff Act of 1930, shall not be construed to entitle the claimant to possession of the property. Such action only stops the summary forfeiture proceeding.

(d) Report to the U. S. Attorney. When the claim and bond are filed within the 20-day period, the district director shall report the case to the U.S. attorney for the institution of condemnation proceedings.

19 C.F.R. 171.33 Supplemental petitions for relief.

(a) Time and place of filing. If the petitioner is not satisfied with a decision of the district director or the Commissioner of Customs, a supplemental petition may be filed with the district director. Such a petition shall be filed either:

(1) Within 60 days from the date of notice to the petitioner of the decision on the initial petition for relief if no effective period is prescribed in the decision; or

(2) Within the time prescribed in the decision on the initial petition for relief as the effective period of the decision.

(b) Consideration - (1) Decisions of the district director. Where the district director has the authority to grant relief in accordance with the provisions of §171.21, he may grant additional relief if he believes it is warranted. If there has been a specific request on the part of the petitioner for review by the regional commissioner of Customs, or if the district director believes no additional relief is warranted, or if the petitioner is not satisfied with the additional relief granted by the district director, the supplemental petition, together with all pertinent documents, shall be forwarded to the regional commissioner of the region in which the district lies for reconsideration and disposition of the case.

(2) Decisions of the Commissioner of Customs. A supplemental petition appealing a decision of the Commissioner of Customs shall be forwarded, together with all pertinent documents, to the Commissioner of Customs for reconsideration of the case.

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